

LEE ENTERPRISES, INC.

IBLA 97-139

Decided December 21, 1998

Appeal from a decision of the Mimbres Resource Area Office, New Mexico, Bureau of Land Management, increasing the annual rental for communications site right-of-way NMNM 75600 from \$3,300 to \$14,420, based on the application of a rental payment schedule.

Affirmed as modified.

1. Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way

Pursuant to 43 C.F.R. § 2803.1-2(d), BLM bases annual rental payments for communication site rights-of-way used for television broadcasting on a rental payment schedule. When such a right-of-way holder serves more than one Rationally Metro Area population, BLM properly imposes the rental payment schedule rate for the largest Rationally Metro Area population. However, when, on appeal, the user establishes that it serves a lesser population within the larger Rationally Metro Area, the rental may be adjusted accordingly.

APPEARANCES: Peter D. O'Connell, Esq., Kathleen A. Kirby, Esq., Washington, D.C., for appellant; Grant L. Vaughan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On December 13, 1996, the Mimbres Resource Area Office, Bureau of Land Management (BLM), issued a decision increasing the annual rental for communications site right-of-way NMNM 75600 from \$3,300 to \$14,420, in accordance with the 1997 rental payment schedule. The decision stated that the new rental would be phased in over a 5-year period and that the first year's rental would be \$4,300. Lee Enterprises, Inc. filed a timely appeal and petitioned for a stay of the rental increase.

In support of its petition for stay, appellant asserted that it had suffered significant operating losses in the past 4 years, and that "to

force KZIA-TV to make payment of such a large sum pending appeal, would create an undue financial hardship, force the station to curtail service, and harm the public interest by potentially depriving Las Cruces viewers of local television service." (Petition for Stay at 2.) In support of its position, appellant filed the statement of an engineer in which he concluded that KZIA-TV did not have the technical ability to provide television coverage under the rules of the Federal Communications Commission (FCC) to the community of El Paso, Texas. Appellant contended that the basis for BLM's assessment of such a large increase in annual rental for the right-of-way was BLM's incorrect conclusion that KZIA-TV provides service to the El Paso, Texas, community.

In an order dated April 22, 1997, the Board granted the petition for stay, stating:

The case record shows that BLM applied the rental schedule based on its conclusion that KZIA-TV served the El Paso, Texas, community. Lee has countered that conclusion with the statement of the engineer that KZIA-TV would not qualify under FCC rules as an El Paso television station. BLM has filed no response to Lee's submissions. It is not clear from the present record whether BLM has properly applied the rental schedule in this case. Accordingly, we direct that BLM file an answer in this case within 30 days of receipt of this Order. That answer should include a copy of the rental schedule and an explanation of BLM's application of that schedule to the right-of-way in question. BLM should also address the statement of the engineer provided by Lee.

The engineer noted that the "KZIA transmission facility is located approximately 30 kilometers north of the heart of El Paso," and that from that location, it is able to provide "good off-air service to a portion of El Paso but there is also a substantial portion of El Paso where the off-air reception is very poor due to the intervening terrain." (Notice of Appeal, Exh. A, Attachment 1 at 1.) "There is a mountain range known as the Franklin Mountains located directly between KZIA and portions of El Paso which are a major terrain obstruction to the transmission signals of KZIA." Id.

According to the declaration of Ray Depa, General Manager, KZIA-TV, the location of the KZIA-TV transmitter precludes the station from providing "coverage on the west side of the Franklin Mountains." (Notice of Appeal, Exh. A.) Appellant estimates that approximately 200,000 people living in El Paso and southern Dona Ana County, New Mexico, cannot receive the KZIA-TV transmission. Appellant states that two former owners of the station went bankrupt and that it has operated at a loss each year since acquiring KZIA-TV. It claims that the increased rental would impose an undue hardship on the station. (Notice of Appeal at 2.)

BLM filed a timely response to the Board's order. Therein, it stated that BLM's policy "when a transmitter serves two Rationally Metro Areas (RMA)

is that the rental fee is to be based on the larger of the two RMA's," citing various pages of a document styled "Communication Use Rental Schedule Policy/Regulation Workshop USFS [United States Forest Service]/BLM," designated by BLM as Exhibit 1 to its Answer. (Answer at 1.) It states that the determination to use the El Paso RMA was based on the original appraisal report for right-of-way NMNM 75600 completed in January 1989, which stated that the property would be used as a television broadcast communications site serving Las Cruces and El Paso. The 1995 population figures for Las Cruces and El Paso, as set forth in the Rand McNally Road Atlas, are 62,126 and 515,342, respectively, El Paso being significantly larger than Las Cruces. (Answer, Exh. 3.) BLM states that the schedule for the television use category for a population the size of El Paso is \$14,420 per year. (Answer, Exh. 4.)

BLM does not deny appellant's claim that it does not have the technical ability to provide television coverage to El Paso under the rules of the FCC, stating that FCC rules "may very well be more technically demanding." (Answer at 2.) BLM asserts that its determination was based on the appraisal report and "general information" that appellant's television station serves both communities.

BLM provides a copy of a map showing that the KZIA-TV transmitter is located much closer to the RMA boundary of the city of El Paso than to the same boundary for the city of Las Cruces. (Answer, Exh. 6.) Also, BLM states that it is aware that "a major portion of El Paso, particularly the residential areas and the main post of Fort Bliss, a large U.S. Army base, lie east of the Franklin Mountains within the good off-air service range of KZIA." (Answer at 2.)

BLM also argues that KZIA-TV "generally holds itself out as an El Paso broadcast station." Id. at 3. In support of that statement, BLM cites the fact that KZIA-TV has an El Paso, Texas, business address; that its business logo identifies it as an El Paso/Las Cruces station; and "almost all local advertising is from El Paso businesses." None of these assertions is disputed by appellant.

[1] Under section 504(g) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1764(g) (1994), BLM is required to charge an annual rental for communication sites and other rights-of-way based on their "fair market value." See 43 C.F.R. § 2803.1-2(a). Regulation 43 C.F.R. § 2803.1-2(d) provides that "annual rental payment for communication uses listed in paragraph(d)(1) [which includes television broadcasting] of this section is based on rental payment schedules." Further, 43 C.F.R. § 2803.1-2(d)(2)(i) states that "rental schedules will be adjusted annually based on the U.S. Department of Labor Consumer Price Index for All Urban Consumers (CPI-U, U.S. City Average, published in July of each year), and Rannally Metro Area population rankings."

In accordance with the regulations, BLM applied the rental payment schedule to determine the rental for the right-of-way in question. The 1997 schedule lists rentals for television transmitter sites ranging from a

low of \$1,236 per year to a high of \$46,350, based exclusively on RMA population size. (Answer, Exh. 4.) A population of less than 25,000 results in a rental of \$1,236, while \$46,350 is charged for a population of 5,000,000 or more.

In this case, KZIA-TV is not located in either the Las Cruces RMA or the El Paso RMA. It is outside each of these RMA's. According to BLM policy, when a facility is outside an RMA, but serves the RMA, generally the RMA should be used. (Answer, Exh. 1 at 8.) BLM also represents that when a facility serves more than one RMA, the larger RMA should be used. That is what BLM did in this case. It determined that KZIA-TV serves both El Paso and Las Cruces, with El Paso having the larger population. Based on the El Paso population of 515,342, BLM used the rental schedule rate of \$14,420 applicable to an RMA population of 500,000 to 999,999. See Answer, Exhs. 4 and 5.

BLM properly applied the rental schedule in determining the rental in this case when it completed the rental calculation sheet on December 12, 1996. See Answer, Exh. 5. However, the record developed on appeal leads us to the conclusion that the rental should be adjusted.

Appellant has established that, although it serves two RMA's, its service to the largest of those, El Paso, is not comprehensive. BLM admits that due to topographic intervention KZIA-TV's service is unavailable to all or part of the El Paso RMA lying west of the Franklin Mountains. BLM does not dispute appellant's contention that the Franklin Mountains preclude KZIA-TV from delivering its signal to "approximately 200,000 persons residing in El Paso and southern Dona Ana County, New Mexico."

Under these circumstances, the El Paso RMA served by KZIA-TV should be considered to have a population of 315,342 (515,342 less 200,000), still much larger than the Las Cruces RMA of 62,126. Applying the 1997 rental payment schedule to an RMA population of 315,342 results in an annual rental of \$12,360. BLM's decision is modified to reflect an annual rental of \$12,360 to be phased-in over a 5-year period. BLM should notify appellant of the amounts due.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified by this opinion.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge